

SECOND REGULAR SESSION

HOUSE BILL NO. 1450

91ST GENERAL ASSEMBLY

INTRODUCED BY REPRESENTATIVES MARBLE AND HICKEY (Co-sponsors).

Read 1st time January 14, 2002, and 1000 copies ordered printed.

TED WEDEL, Chief Clerk

3718L.011

AN ACT

To repeal section 34.057, RSMo, and to enact in lieu thereof one new section relating to retainage clauses for public contracts.

Be it enacted by the General Assembly of the state of Missouri, as follows:

Section A. Section 34.057, RSMo, is repealed and one new section enacted in lieu thereof, to be known as section 34.057, to read as follows:

34.057. 1. Unless contrary to any federal funding requirements or unless funds from a state grant are not timely received by the contracting public municipality but notwithstanding any other law to the contrary, all public works contracts made and awarded by the appropriate officer, board or agency of the state or of a political subdivision of the state or of any district therein, including any municipality, county and any board referred to as the public owner, for construction, reconstruction or alteration of any public works project, shall provide for prompt payment by the public owner to the contractor and prompt payment by the contractor to the subcontractor and material supplier in accordance with the following:

(1) A public owner shall make progress payments to the contractor on at least a monthly basis as the work progresses, or, on a lump sum basis according to the terms of the lump sum contract. Except in the case of lump sum contracts, payments shall be based upon estimates prepared at least monthly of work performed and material delivered, as determined by the project architect or engineer. Retainage withheld on public works projects shall not exceed five percent of the value of the contract or subcontract unless the public owner and the architect or engineer determine that a higher rate of retainage is required to ensure performance of the contract. **Written notification defining the specific reason for the requirement of retainage in excess of the required five percent shall be signed by the owner and the architect or engineer and delivered by certified mail to the general contractor no less than fourteen days following**

19 **the public bid opening.** Retainage, however, shall not exceed ten percent of the value of the
20 contract or subcontract. Except as provided in subsection 4 of this section, the public owner
21 shall pay the contractor the amount due, less a retainage not to exceed ten percent, within thirty
22 days following the latter of the following:

23 (a) The date of delivery of materials or construction services purchased;

24 (b) The date, as designated by the public owner, upon which the invoice is duly delivered
25 to the person or place designated by the public owner; or

26 (c) In those instances in which the contractor approves the public owner's estimate, the
27 date upon which such notice of approval is duly delivered to the person or place designated by
28 the public owner;

29 (2) Payments shall be considered received within the context of this section when they
30 are duly posted with the United States Postal Service or other agreed upon delivery service or
31 when they are hand-delivered to an authorized person or place as agreed to by the contracting
32 parties;

33 (3) If, in the discretion of the owner and the project architect or engineer and the
34 contractor, it is determined that a subcontractor's performance has been completed and the
35 subcontractor can be released prior to substantial completion of the public works contract
36 without risk to the public owner, the contractor shall request such adjustment in retainage, if any,
37 from the public owner as necessary to enable the contractor to pay the subcontractor in full. The
38 public owner may reduce or eliminate retainage on any contract payment if, in the public owner's
39 opinion, the work is proceeding satisfactorily. If retainage is released and there are any
40 remaining minor items to be completed, an amount equal to two hundred percent of the value
41 of each item as determined by the public owner's duly authorized representative shall be withheld
42 until such item or items are completed;

43 (4) The public owner shall pay the retainage, less any offsets or deductions authorized
44 in the contract or otherwise authorized by law, to the contractor after substantial completion of
45 the contract work and acceptance by the public owner's authorized contract representative, or as
46 may otherwise be provided by the contract specifications for state highway, road or bridge
47 projects administered by the state highways and transportation commission. Such payment shall
48 be made within thirty days after acceptance, and the invoice and all other appropriate
49 documentation and certifications in complete and acceptable form are provided, as may be
50 required by the contract documents. If at that time there are any remaining minor items to be
51 completed, an amount equal to two hundred percent of the value of each item as determined by
52 the public owner's representative shall be withheld until such items are completed;

53 (5) All estimates or invoices for supplies and services purchased, approved and
54 processed, or final payments, shall be paid promptly and shall be subject to late payment charges

55 provided in this section. Except as provided in subsection 4 of this section, if the contractor has
56 not been paid within thirty days as set forth in subdivision (1) of subsection 1 of this section, the
57 contracting agency shall pay the contractor, in addition to the payment due him, interest at the
58 rate of one and one-half percent per month calculated from the expiration of the thirty-day period
59 until fully paid;

60 (6) When a contractor receives any payment, the contractor shall pay each subcontractor
61 and material supplier in proportion to the work completed by each subcontractor and material
62 supplier his application less any retention not to exceed ten percent. If the contractor receives
63 less than the full payment due under the public construction contract, the contractor shall be
64 obligated to disburse on a pro rata basis those funds received, with the contractor, subcontractors
65 and material suppliers each receiving a prorated portion based on the amount of payment. When,
66 however, the public owner does not release the full payment due under the contract because there
67 are specific areas of work or materials he is rejecting or because he has otherwise determined
68 such areas are not suitable for payment then those specific subcontractors or suppliers involved
69 shall not be paid for that portion of the work rejected or deemed not suitable for payment and all
70 other subcontractors and suppliers shall be paid in full;

71 (7) If the contractor, without reasonable cause, fails to make any payment to his
72 subcontractors and material suppliers within fifteen days after receipt of payment under the
73 public construction contract, the contractor shall pay to his subcontractors and material suppliers,
74 in addition to the payment due them, interest in the amount of one and one-half percent per
75 month, calculated from the expiration of the fifteen-day period until fully paid. This subdivision
76 shall also apply to any payments made by subcontractors and material suppliers to their
77 subcontractors and material suppliers and to all payments made to lower tier subcontractors and
78 material suppliers throughout the contracting chain;

79 (8) The public owner shall make final payment of all moneys owed to the contractor, less
80 any offsets or deductions authorized in the contract or otherwise authorized by law, within thirty
81 days of the due date. Final payment shall be considered due upon the earliest of the following
82 events:

83 (a) Completion of the project and filing with the owner of all required documentation
84 and certifications, in complete and acceptable form, in accordance with the terms and conditions
85 of the contract;

86 (b) The project is certified by the architect or engineer authorized to make such
87 certification on behalf of the owner as having been completed, including the filing of all
88 documentation and certifications required by the contract, in complete and acceptable form; or

89 (c) The project is certified by the contracting authority as having been completed,
90 including the filing of all documentation and certifications required by the contract, in complete

91 and acceptable form.

92 2. Nothing in this section shall prevent the contractor or subcontractor, at the time of
93 application or certification to the public owner or contractor, from withholding such applications
94 or certifications to the owner or contractor for payment to the subcontractor or material supplier.
95 Amounts intended to be withheld shall not be included in such applications or certifications to
96 the public owner or contractor. Reasons for withholding such applications or certifications shall
97 include, but not be limited to, the following: unsatisfactory job progress; defective construction
98 work or material not remedied; disputed work; failure to comply with other material provisions
99 of the contract; third party claims filed or reasonable evidence that a claim will be filed; failure
100 of the subcontractor to make timely payments for labor, equipment and materials; damage to a
101 contractor or another subcontractor or material supplier; reasonable evidence that the contract
102 can not be completed for the unpaid balance of the subcontract sum or a reasonable amount for
103 retention, not to exceed the initial percentage retained by the owner.

104 3. Should the contractor determine, after application or certification has been made and
105 after payment has been received from the public owner, or after payment has been received by
106 a contractor based upon the public owner's estimate of materials in place and work performed
107 as provided by contract, that all or a portion of the moneys needs to be withheld from a specific
108 subcontractor or material supplier for any of the reasons enumerated in this section, and such
109 moneys are withheld from such subcontractor or material supplier, then such undistributed
110 amounts shall be specifically identified in writing and deducted from the next application or
111 certification made to the public owner or from the next estimate by the public owner of payment
112 due the contractor, until a resolution of the matter has been achieved. Disputes shall be resolved
113 in accordance with the terms of the contract documents. Upon such resolution the amounts
114 withheld by the contractor from the subcontractor or material supplier shall be included in the
115 next application or certification made to the public owner or the next estimate by the public
116 owner and shall be paid promptly in accordance with the provisions of this section. This
117 subsection shall also apply to applications or certifications made by subcontractors or material
118 suppliers to the contractor and throughout the various tiers of the contracting chain.

119 4. The contracts which provide for payments to the contractor based upon the public
120 owner's estimate of materials in place and work performed rather than applications or
121 certifications submitted by the contractor, the public owner shall pay the contractor within thirty
122 days following the date upon which the estimate is required by contract to be completed by the
123 public owner, the amount due less a retainage not to exceed five percent. All such estimates by
124 the public owner shall be paid promptly and shall be subject to late payment charges as provided
125 in this subsection. After the thirtieth day following the date upon which the estimate is required
126 by contract to be completed by the public owner, the contracting agency shall pay the contractor,

127 in addition to the payment due him, interest at a rate of one and one-half percent per month
128 calculated from the expiration of the thirty-day period until fully paid.

129 5. Nothing in this section shall prevent the owner from withholding payment or final
130 payment from the contractor, or a subcontractor or material supplier. Reasons for withholding
131 payment or final payment shall include, but not be limited to, the following: liquidated damages;
132 unsatisfactory job progress; defective construction work or material not remedied; disputed
133 work; failure to comply with any material provision of the contract; third party claims filed or
134 reasonable evidence that a claim will be filed; failure to make timely payments for labor,
135 equipment or materials; damage to a contractor, subcontractor or material supplier; reasonable
136 evidence that a subcontractor or material supplier cannot be fully compensated under its contract
137 with the contractor for the unpaid balance of the contract sum; or citation by the enforcing
138 authority for acts of the contractor or subcontractor which do not comply with any material
139 provision of the contract and which result in a violation of any federal, state or local law,
140 regulation or ordinance applicable to that project causing additional costs or damages to the
141 owner.

142 6. Notwithstanding any other provisions in this section to the contrary, no late payment
143 interest shall be due and owing for payments which are withheld in good faith for reasonable
144 cause pursuant to subsections 2 and 5 of this section. If it is determined by a court of competent
145 jurisdiction that a payment which was withheld pursuant to subsections 2 and 5 of this section
146 was not withheld in good faith for reasonable cause, the court may impose interest at the rate of
147 one and one-half percent per month calculated from the date of the invoice and may, in its
148 discretion, award reasonable attorney fees to the prevailing party. In any civil action or part of
149 a civil action brought pursuant to this section, if a court determines after a hearing for such
150 purpose that the cause was initiated, or a defense was asserted, or a motion was filed, or any
151 proceeding therein was done frivolously and in bad faith, the court shall require the party who
152 initiated such cause, asserted such defense, filed such motion, or caused such proceeding to be
153 had to pay the other party named in such action the amount of the costs attributable thereto and
154 reasonable expenses incurred by such party, including reasonable attorney fees.